

The Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

ANDRE THOMPSON, a single man; and
BRYSON CHAPLIN, a single man,

NO. 3:18-cv-05267

Plaintiffs,

Vs.

CITY OF OLYMPIA, a local government entity; and RYAN DONALD and "JANE DOE" DONALD, individually and the marital community comprised thereof,

PLAINTIFFS' BRIEF IN
OPPOSITION TO DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT

**NOTE ON MOTION CALENDAR:
FRIDAY, DECEMBER 7, 2018**

1. INTRODUCTION

Defendants' motion for summary judgment attempts to mislead the Court with multiple statements of supposed undisputed "fact", when in reality almost every such "fact" is contested and was contradicted by evidence developed during the criminal investigation or testimony given under oath during the Plaintiffs' underlying criminal trial or by declaration. There are genuine issues of material fact as to whether the circumstances warranted the use of deadly force by Officer Donald in this case, and it is clear that Officer Donald should

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1 have known that doing so was a violation of established law. Granting summary judgment
 2 would be inappropriate, and Plaintiffs request that the motion be denied.

3 To avoid filing an over-length brief, but because Plaintiffs believe they need to advise
 4 the Court in some detail of the relevant and material facts in dispute that were not presented
 5 by Defendants, Plaintiffs submit and incorporate by reference the Declaration of Sunni Ko,
 6 which contains not only the evidence cited below but also a chart for the Court's use
 7 demonstrating Defendants' allegations versus the extensive contradictory evidence.

8 II. RELEVANT FACTUAL SUMMARY

9 a. Event and Procedural History:

10 On May 21, 2015, at approximately 1:15:48 a.m., Officer Ryan Donald of the
 11 Olympia Police Department reported to dispatch that he had spotted two suspects with
 12 skateboards on Cooper Point Road in Olympia Washington. *Declaration of Sunni Ko, Ex*
 13 "*1*" (*CAD Report & Trnscpt. of Radio Transmissions*). Less than a minute later, Officer
 14 Donald reported shots had been fired and that possibly one suspect had been hit. *Id.* He
 15 requested assistance and told dispatch the suspects had fled into a wooded area adjacent to
 16 Cooper Point Road. *Id.* When other officers arrived, they found Mr. Bryson Chaplin
 17 unresponsive and Mr. Andre Thompson shot in his abdomen and in complete disbelief he
 18 and his brother had been shot. *Decl. of Ko, Ex. "5", at p. 3 (Trnscpt. of Evers)*.

19 At St. Peter Hospital, Mr. Chaplin was determined to have sustained multiple
 20 gunshot wounds, one bullet shattering his spinal column. *Decl. of Ko, Ex. "11".* A bullet
 21 had struck his 11th spinal vertebrae, shattering the vertebral column and injuring his spine

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1 with a fragment lodging next to the column. Mr. Chaplin was immediately airlifted to
 2 Harborview Medical Center and was told he would never be able to walk again.

3 Almost two years after the incident, in May 2017, the matter proceeded to trial. The
 4 trial lasted six weeks, and during the trial, over 30 witnesses testified on behalf of the State,
 5 with Officer Donald as its star witness. Throughout the trial, the State's key forensic
 6 witnesses, Kristopher Kern and Kathy Geil of the Washington State Patrol Crime
 7 Laboratory, actually refuted the testimony given by Officer Donald. *Decl. of Ko, Exs. "24"*
 8 *and "22", respectively.* The physical evidence presented at trial refuted the testimony
 9 given by Officer Donald. Defense experts, Dr. John Lacy and Mr. Kay Sweeney, also
 10 refuted the testimony given by Officer Donald. *Decl. of Ko, Exs. "27" and "23",*
 11 *respectively.*

12 Mr. Thompson and Mr. Chaplin did not testify on their own behalf at their criminal
 13 trial. Their sister, Jasmine Thompson, who had witnessed Officer Donald shooting her
 14 brother Andre Thompson did not testify, though she had been interviewed by police. *Decl.*
 15 *of Ko, Ex. "31".*

16 After days of deliberation, after numerous notices that the jury could not reach
 17 unanimous decisions on counts I and II, the jury ultimately found each brother guilty of one
 18 count of assault in the 3rd degree on Count II – a lesser included crime of assault in the 2nd
 19 degree.

20 As more fully articulated below, the facts as alleged by Officer Donald are clearly
 21 disputed by Andre Thompson and Bryson Chaplin. See *Decl. of Ko, Exs. "4", "18", and*

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1 “30” (*Declarations of Andre Thompson, Bryson Chaplin, and Jasmine Thompson,*
 2 *respectively*). The forensic evidence also refutes the claims made by Officer Donald.

3 b. **Officer Donald’s Testimony**

4 Officer Donald claims when he commanded that Plaintiffs take a seat in front of his
 5 patrol vehicle, the two men rapidly approached the passenger side of his vehicle. *Decl. of*
 6 *Ko, Ex. “2”, at pp. 184, 186.* He testified that the man in the dark colored shirt [Bryson
 7 Chaplin], raised his skateboard above his head as he started running towards Officer
 8 Donald’s patrol vehicle. *Id., at p. 191.* He then testified that when Mr. Thompson and
 9 Mr. Chaplin were at the right rear passenger side of the patrol vehicle, Mr. Thompson
 10 suddenly and unexpectedly grabbed Officer Donald’s right arm and began spinning him
 11 around. *Id., at pp. 206, 210, 223, 225 – 26.*

12 Officer Donald testified that he was caught totally by surprise (*Id., at p. 210*) and
 13 was unable to defend himself from Mr. Thompson’s attack. *Id., at pp. 210, 215 - 16, 225 -*
 14 *26.* Officer Donald testified that all he could do was make unsuccessful attempts to pull his
 15 arm free and regain his balance. *Id.* As he continued to struggle with Mr. Thompson
 16 without success, Officer Donald testified that Mr. Thompson somehow was able to bend
 17 Officer Donald’s body at a 45 degree angle in a “hunched over or bent-over position,”
 18 forcing his head near Mr. Thompson’s “chest height.” *Decl. of Ko, Ex. “2”, at pp. 225 -*
 19 *26.* Meanwhile, while “attempting to pull away, pull back and away from the subject
 20 holding onto [him],” as he was being “pulled to the ground” and “thrown off balance,”
 21 Officer Donald testified he observed Mr. Chaplin standing directly behind him with his
 22 skateboard raised above his head “lined-up with [his] head,” ready to strike. *Id., at pp.*
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1 225, 229-30, 232. Fearing for his life, Officer Donald testified he removed his firearm from
 2 his left holster with his left hand, placed his left hand underneath his right arm/armpit, and
 3 fired an unknown number of rounds, although he missed hitting his targets. *Id., at pp.*
 4 **231, 234 – 36, 452.** Officer Donald had no explanation as to how he could have missed
 5 Mr. Chaplin when Mr. Chaplin had been standing “very close” – “within a foot or two”
 6 from Officer Donald, Mr. Chaplin’s torso was clearly visible to Officer Donald, and Officer
 7 Donald was aiming for “center mass”. *Id., at pp. 232, 455.* All of this occurred with 51
 8 seconds, according to Officer Donald.

9 Officer Donald notified dispatch multiple times that the two suspects had fled into
 10 the woods, although he had “lost sight of them as they ran northbound” as the area was
 11 “very dark” and “there were no street lights illuminating the roadway”[.] *Decl. of Ko, Ex.*
 12 **“1”.** Rather than stay near his vehicle and wait for backup, Officer Donald testified he
 13 pursued the two suspects who had allegedly just attacked him without provocation and had
 14 attempted to strike him with a skateboard. *Decl. of Ko, Ex. “2”, at pp. 241-43.* As he
 15 stood near the guardrail with his gun drawn and his flashlight pointed into the wood line,
 16 Officer Donald failed to notice another patrol vehicle arrive at the scene with its lights and
 17 siren blaring. *Decl. of Ko, Ex. “2”, at p. 2.* Less than a minute later, Officer Donald
 18 notified dispatch he shot two men and assistance were needed. *Decl. of Ko, Ex. “1”.*

19 Officer Donald later testified he shot Mr. Chaplin when he was about 5 feet away
 20 from him because Mr. Chaplin came at him with his skateboard raised above his head.
 21 *Decl. of Ko, Ex. “2”, at p. 286.* He testified that he warned Mr. Chaplin he was going to
 22 discharge his weapon before firing his gun. *Id., at p. 701.* After he shot Mr. Chaplin,
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1 Officer Donald testified that Mr. Chaplin stumbled couple feet and began “rolling around
 2 quite a bit.” *Id., at pp. 561 – 562.*

3 Officer Donald testified that after he shot Mr. Chaplin, Mr. Thompson began
 4 “taking very large steps” towards him, ignoring his commands to stop. *Id., at p. 301.* He
 5 claimed that Mr. Thompson got close enough to reach for Officer Donald’s gun, and
 6 Officer Donald could see Mr. Thompson’s eyes glancing at his weapon. Officer Donald
 7 pulled his weapon, and he testified that Mr. Thompson was close-enough that Officer
 8 Donald could not even extend his arm out to support a full shooting position. Officer
 9 Donald then fired multiple times at Mr. Thompson, one bullet striking his abdomen. *Id., at*
 10 *pp. 565-66.* He told the jury he warned Mr. Thompson he was going to shoot, that he was
 11 going to discharge his weapon before he fired multiple times. *Id., at p. 702.*

12 c. Witnesses Testimony Disputing Officer Donald’s Testimony

13 Mr. Andre Thompson and Mr. Bryson Chaplin state that they were walking north on
 14 Cooper Point Road heading home after Mr. Chaplin stole some beer at a local Safeway
 15 grocery store. While walking, they noticed a vehicle pull-over onto the shoulder of the road
 16 southbound on Cooper Point Road. See *Decl. of Ko, Exs. “4” and “18”*. Because the
 17 vehicle did not have the classic emergency lights turned on but only a spotlight pointed in
 18 their direction, they suspected it could be a campus security officer attempting to make
 19 contact. Then they heard a male voice whom they could not see commanding them to take
 20 a seat in front of the vehicle. To avoid confrontation, they began running across Cooper
 21 Point Road when they heard the person yell, “Olympia Police!” “Stop!” They did not stop;
 22 they continued running. *Decl. of Ko, Exs. “4” and “18”*.

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1 As they ran north on Cooper Point Road, Mr. Thompson and Mr. Chaplin heard
 2 multiple gunshots. They had no idea if they were being shot at intentionally or if the shots
 3 were fired merely as a warning. *Decl. of Ko, Exs. "4" and "18".* In fear for their lives, and
 4 thinking they would be better protected in the wooded area next to the house on the west of
 5 Cooper Point Rd, Mr. Thompson began running in the direction of the woods with Mr.
 6 Chaplin following in close pursuit. *Decl. of Ko, Ex. "4".* They were running in near
 7 complete darkness, and Mr. Thompson struck a recycling bin sitting curbside and dropped
 8 his skateboard. He continued on without it. *Decl. of Ko, Ex. "4".*

9 While running north in the woods, they heard the siren of another patrol vehicle and
 10 knew there were other officers coming to the scene. They also heard loud noises
 11 approaching from the north. Believing they were about to be cornered, they turned around
 12 and ran back in the direction from which they had come. *Decl. of Ko, Exs. "4" and "18."*

13 Mr. Thompson was the first to emerge out of the bushes and onto Cooper Point
 14 Road, with Mr. Chaplin following closely behind. As Mr. Thompson started running across
 15 the road, he heard an officer shout, "Stop!" "Get down! *Decl. of Ko, Ex. "4."*" Believing
 16 that this was the same officer who had already fired his weapon at them, Mr. Thompson
 17 stopped running. Mr. Thompson heard, "Stop!" "Get on the ground!" "Get down!" As he
 18 turned to look back, he saw Mr. Chaplin emerging out of the woods onto the shoulder of
 19 the road; this was immediately followed by multiple gunshots. To his horror, Mr.
 20 Thompson watched his brother fall to the ground. *Decl. of Ko, Ex. "4."* There were no
 21 shouts from Officer Donald he was going to shoot. *Decl. of Ko, Ex. "4".¹*

22 ¹ Of note, not one of the 30 civilian witnesses who were interviewed ever told police they heard anyone
 23 shout that he was going to shoot before shots were fired, and no a single witness at trial testified he or she

1 While watching his brother lying motionless next to the fog line, Mr. Thompson
 2 took several steps towards his brother before he was ordered to stop. Immediately he
 3 stopped, and turned to face Officer Donald. *Decl. of Ko, Ex. "4"*. He was in shock that
 4 Officer Donald had shot and possibly killed his brother. Mr. Thompson stood motionless,
 5 shouting, "Bro!" "Bro!" "Bro!" He then yelled, "Why the f*** did you shoot my brother?"
 6 and "Are you going to shoot me too?" *Decl. of Ko, Ex. "4"*.

7 As he stood in the middle of the road yelling at Officer Donald, Officer Donald
 8 began slowly walking towards Mr. Thompson. Officer Donald yelled, "Get down!" "Get on
 9 the ground!" *Decl. of Ko, Ex. "4"*. Before Mr. Thompson could move, Officer Donald
 10 (again without warning) shot him in the abdomen, and Mr. Thompson fell to the ground.²
 11 *Decl. of Ko, Ex. "4"*.

12 Coincidentally, and unbeknownst to Mr. Thompson at the time, his sister Jasmine
 13 Thompson and her ex-boyfriend were driving towards home on Cooper Point Road right
 14 then after leaving Capital Medical Center when they heard what they believed were three
 15 gunshots. *Decl. of Ko, Ex. "30"*. Ms. Thompson, who had been reclining in her passenger
 16 seat with her eyes closed, immediately sat up to see from whom the shots were fired. When
 17 she looked around, she saw a police officer [Officer Donald] standing in the northbound
 18 lane on Cooper Point Road with his firearm drawn and his flashlight on. At first, she
 19

20 heard Officer Donald shout he was going to discharge his weapon, contradicting Officer Donald's
 21 testimony.

22 ² Contrary to Officer Donald's statements that he warned Mr. Chaplin and Thompson he was going to shoot
 23 if they did not follow his commands, Officer Paul Evers, one of the other officers on the scene, stated
 24 during his interviews that he heard Officer Donald giving commands to "stop" and to "get on the ground"
 25 before Officer Donald shot Andre Thompson, but he never heard Officer Donald yell that he would shoot.
 26 *Decl. of Ko, Ex. "25"* at p. 26.

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1 believed Officer Donald was attempting to stop their vehicle, and they immediately pulled
 2 over. However, Officer Donald walked past their vehicle, moving southbound, so they
 3 pulled back onto the road heading north. *Decl. of Ko, Ex. "30"*. When Ms. Thompson
 4 looked to see what Officer Donald was focused upon, she noticed a male figure in a white
 5 T-shirt standing further down Cooper Point Road near the centerline. She did not know at
 6 the time this man in the white T-shirt was her brother Andre.

7 As her vehicle drove further north, Jasmine Thompson's eyes remained transfixed
 8 on the two figures as she watched Officer Donald moving slowly towards the man in the
 9 white T-shirt. She watched in disbelief as she saw the man fall to the ground after Officer
 10 Donald fired multiple shots in his direction. *Decl. of Ko, Ex. "30"*. What haunts her still is
 11 the memory of seeing the man clearly weaponless as Officer Donald's flashlight illuminated
 12 his hands. *Decl. of Ko, Ex. "30"*.

13 d. **Forensic Evidence Refuting Officer Donald's Testimony**

14 In addition to witness testimony, there was significant forensic testimony refuting
 15 Officer Donald's testimony. To begin with, defense crime scene reconstruction expert, Mr.
 16 Kay Sweeney, testified that based on the trajectory of the bullet strikes, the grassy depression
 17 adjacent to the fence line³, the location of the patrol vehicle, the location of the three casings
 18 on the passenger side of the patrol vehicle, and the ejection pattern of Officer Donald's
 19 firearm, Officer Donald was standing next to the fence north of the patrol vehicle facing east
 20 while firing his gun at a downward angle in the northeast direction, contrary to Officer
 21 Donald's testimony about being spun around and grabbed by Mr. Thompson as he

22
 23 ³ Sergeant Brady noted footprints in the grassy depression. *Decl. of Ko, Ex. "Z"*.

1 discharged his firearm. *Decl. of Ko, Ex. "23" at pp. 61 - 67, including Photos and
2 Diagrams Admitted During Trial.*

3 When asked whether the cartridge casings would have landed on the passenger side
4 of the patrol vehicle if the shooter was bent-over at a 45 degree angle with his shooting left
5 arm underneath his right armpit, aiming at a target standing behind and above him, the
6 State's crime scene reconstruction expert from the Washington State Crime Laboratory, Mr.
7 Kristopher Kern, stated, "I think that's a stretch potentially," *Decl. of Ko, Ex. "24" at p.
8 149.*

9 The State's firearms expert, Ms. Kathy Geil, testified that if Officer Donald was
10 behind the rear of his patrol vehicle firing his weapon in a northeast direction, thus creating
11 the three bullet strikes on the road, and if the casings are ejected to the right from the
12 ejection portal, the casings would have landed to the "center of the road" and not on the
13 passenger side of the patrol vehicle on the grassy strip adjacent to the fence line. This is
14 contrary to what Officer Donald stated about the direction the muzzle of his gun was facing
15 when he discharged his firearm. *Decl. of Ko, Ex. "22", at pp. 128 - 29.*

16 Dr. John Lacy testified the gunshot wound that shattered Mr. Chaplin's spinal
17 column was "immediately incapacitating." He testified, "It's very unlikely that you're going
18 to have much movement after this, and I think it's probably more likely than not that he
19 would have collapsed right way," contrary to Officer Donald's testimony that Mr. Chaplin
20 stumbled a couple feet, tumbled and rolled from side to side. *Decl. of Ko, Ex. "27", at p.
21 74.* Additionally, defense expert Mr. Kay Sweeney testified he observed no signs of Mr.
22 Chaplin stumbling or tumbling after he was shot. *Decl. of Ko, Ex. "23", at p. 188.* Mr.
23

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1 Kern also testified Mr. Chaplin would have had to stumble back nearly 20 feet to fall next to
 2 the fog line if Officer Donald was standing at the center line and Mr. Chaplin had been
 3 approximately five feet away when shots were fired. *Decl. of Ko, Ex. "24" at pp. 121 -*
 4 *122.*

5 Ms. Geil testified that the drop-off distance for Officer Donald's gun was 48 inches,
 6 and Mr. Sweeney testified he observed no gunshot residue on Mr. Thompsons' white T-
 7 shirt. Hence, Mr. Sweeney concluded that Mr. Thompson was *more* than 48 inches away
 8 from the muzzle of Officer Donald's firearm when he was shot in the abdomen, again
 9 contrary to Officer Donald's testimony that Mr. Thompson was within reaching distance to
 10 his firearm when Officer Donald shot him. *Decl. of Ko, Ex. "23", at p. 196.*

11 III. EVIDENCE RELIED UPON

12 A. Declaration of Sunni Ko, with exhibits.

13 IV. LEGAL ARGUMENT

14 A. **Summary Judgment Standard**

15 The Court shall grant summary judgment if no genuine dispute of material fact exists
 16 and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The
 17 moving party bears the initial burden of demonstrating the absence of a genuine issue of
 18 material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A fact is material if it might
 19 affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477
 20 U.S. 242, 248 (1986). The adverse party must present affirmative evidence, which "is to be
 21 believed" and from which all "justifiable inferences" are to be favorably drawn. *Anderson*, 477
 22 at 255, 257.

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B. The Fourth Amendment.

The Fourth Amendment prohibits law enforcement officers from using “objectively unreasonable” force to “seize” a person. *Rodriguez v. Swartz*, 899 F.3d 719, 728–29 (9th Cir. 2018); *Torres v. City of Madera*, 648 F.3d 1119, 1121 (9th Cir. 2011). And apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment. *Curnow v. Ridgecrest Police*, 952 F.2d 321 (9th Cir. 1991) (citing *Tennessee v. Garner*, supra 471 U.S. at 7). The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. *Torres*, 648 F.3rd at 1201, citing *Graham v. Connor*, 490 U.S. 386, 396 (1989). However, in evaluating the nature and quality of the intrusion on a plaintiff’s Fourth Amendment interests, the Court must consider “the type and amount of force inflicted”. *Chew v. Gates*, 27 F.3d 1432, 1440 (9th Cir. 1994).

The court's inquiry therefore is "whether the totality of circumstances, (taking into consideration the facts and circumstances of the particular case including the severity of the crime at issue; whether the suspect poses an immediate threat to the safety of the officers or others; and whether he is actively resisting arrest or attempting to evade by flight) justified the particular type of seizure." *Torres*, 648 F.3rd at 1201, quoting *Curnow v. Ridgecrest Police*, 952 F.2d 321, 325 (9th Cir. 1991). Courts have now gone further and held that even when a felony suspect tries to escape, "where the suspect poses no immediate threat to the officer and no threat to others, the harm from failing to apprehend him does not justify the use of

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1 deadly force to do so.” *Rodriguez v. Swartz*, 899 F.3d at 729, quoting *Tennessee v. Garner*, 471
 2 U.S. 1, 11 (1985). Pertinent to the present matter, the 9th Circuit has expressly held that
 3 “[E]very reasonable law enforcement officer should know that ‘officers may not shoot to kill
 4 unless, at a minimum, the suspect presents an immediate threat to the officer or others, or is
 5 fleeing *and* his escape will result in a serious threat of injury to persons.’” *Id.*, quoting *Harris*
 6 *v. Roderick*, 126 F.3d 1189, 1201 (9th Cir. 1997) (Emphasis added). And “whenever
 7 practicable, a warning must be given before deadly force is employed.” *Id. Garner*, 471 U.S.
 8 at 11-12.

10 1. **Deadly Force Used Against Plaintiffs Violated the Fourth Amendment.**

11 Viewing the facts in the light most favorable to the Plaintiffs, Officer Donald’s
 12 conduct of shooting two men who were trying to flee clearly violated the Fourth
 13 Amendment.

14 Here, Mr. Chaplin engaged in misdemeanor shoplifting. He was caught as he tried to
 15 steal beer, and Mr. Chaplin and Mr. Thompson ran from security before the police arrived.
 16 When Officer Donald later attempted to detain the two brothers, they again ran to avoid
 17 confrontation, to avoid detention. They did not purposely, actively attack an armed police
 18 officer. They did not physically engage with Officer Donald, whom they believed was going
 19 to cite them for shoplifting. They did what they did before: they ran. They had no idea
 20 Officer Donald was going to start firing his weapon, into the pavement three times and once
 21 in their direction, as they fled to get away from him.

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1 Because warning shots are against Department policy, Officer Donald, had no choice
 2 but to concoct an outrageous story about how he was attacked and almost struck with a
 3 skateboard to justify the warning shots into the pavement. He knew this behavior is
 4 expressly unreasonable under the *Rodriguez v. Swartz* evaluation. Because warning shots are
 5 not permitted, he had to figure out a way to explain how/why he used deadly force against
 6 two men with skateboards when he was never struck with a skateboard, when he didn't have
 7 a mark on him, when neither men sustained a bullet wound during the first volley of shots
 8 near the patrol vehicle.

9
 10 Over the course of five days, Officer Donald concocted a story of how he was
 11 attacked unexpectedly, how he was bent over at a 45 degree angle, how he was spun around,
 12 how he could not defend himself from Mr. Thompson, how all the years of self-defense
 13 training was all for naught, as Mr. Chaplin tried to strike his head with the skateboard. The
 14 physical evidence at the scene, however, contradicted his elaborate story of the first
 15 encounter. The location of the spent cartridge casings refuted his allegations. The State's
 16 own firearms expert and crime scene reconstruction expert from the Washington State
 17 Patrol Crime Lab contradicted his claims.
 18

19 After the first volley of shots, Officer Donald testified he had lost sight of them
 20 because the area was so extremely dark and so poorly illuminated. Nevertheless, Officer
 21
 22
 23

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1 Donald did not wait for backup.⁴ He ran after them, telling dispatch he saw them running
 2 into the wood line. When Officer Evers arrived at the scene with his emergency lights on,
 3 he observed Officer Donald shining his flashlight into the woods with his gun drawn and
 4 ready to fire. Ready and waiting.

5 Less than two minutes later, Officer Donald shot Mr. Chaplin four times. He shot
 6 Mr. Chaplin as he emerged from the woods, running away from Officer Evers and Officer
 7 Luck O'Brien. He shot Mr. Chaplin because Mr. Chaplin did not heed his command to stop,
 8 to get down. He shot Mr. Chaplin without ever warning that he would be shot. Then he
 9 shot Mr. Thompson – who was clearly unarmed. He shot Mr. Thompson as he stood in the
 10 center of the road shouting for his brother, “Bro!” “Bro!” “Bro!” after he saw his brother
 11 shot down. Who yelled, “Why the f*** did you shoot my brother!”

13 Officer Donald claimed Mr. Thompson was reaching for his weapon. He shot
 14 because he feared Mr. Thompson who was so close would grab his gun and use it against
 15 him. However, Mr. Thompson’s shirt (which the police did *not* send to the crime lab for
 16 gunshot residue analysis) was analyzed by defense expert Mr. Kay Sweeney. The shirt, which
 17 should have had gunshot residue if Mr. Thompson was less than 48 inches from muzzle of
 18 the gun, had no evidence of gunshot residue at all. More importantly, Dr. Lacy determined
 19

21 ⁴ Of import is that on May 13, 2013, Officer Donald failed to call for backup in an encounter which was
 22 later identified by his superior as a concern because it was “becoming a recurring theme for Officer
 23 Donald”, as was his going “hands on” with multiple suspects. The supervisor planned to monitor Officer
 24 Donald’s tactics and make sure his future shift supervisors were aware of the concerns. *Decl. of Ko, Ex.*
 25 “Q”.

1 the injury to Mr. Chaplin's spinal column was "immediately incapacitating," thus refuting the
 2 evidence that Mr. Chaplin stumbled a couple feet and rolled from side to side, ending up
 3 over 20 feet away from the center line where Officer Donald claimed he fired his weapon.

4 By shooting Mr. Chaplin multiple times when he posed no immediate threat to
 5 Officer Donald or others, when he was running away to avoid confrontation, when Officer
 6 Donald knew the only crime he'd been involved in was a minor theft incident where no one
 7 was hurt or injured, Officer Donald used excessive force to seize Mr. Chaplin. By shooting
 8 Mr. Thompson when he posed no immediate threat to Officer Donald or others, when he
 9 was not actively fleeing from Officer Donald, when Officer Donald had other less lethal
 10 weapons at his disposal, Officer Donald used excessive force, thus violating Mr.
 11 Thompson's Fourth Amendment right to be free from unreasonable seizure.
 12

13 In light of the voluminous conflicting testimony and evidence, summary judgment
 14 should be denied. It is up to a jury to decide whose testimony is more credible, more
 15 reliable; whose testimony is consistent with and comports with the forensic evidence.
 16

17 C. **There Can Be No Qualified Immunity When Relevant Facts Are In Dispute.**

18 Qualified immunity attaches to an officer's actions unless two questions can be
 19 answers in the affirmative: 1) Was the law governing the official's conduct clearly
 20 established? 2) Under that law, could a reasonable officer have believed the conduct was
 21 lawful? *Harris v. Roderick*, 126 F.3d 1189, 1201 (9th Cir. 1997). Here, the 9th circuit has
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1 already addressed the issue of shooting at fleeing suspects and found it unlawful without an
2 immediate threat:

3 [E]very reasonable law enforcement officer should know that ‘officers may
4 not shoot to kill unless, at a minimum, the suspect presents an immediate
5 threat to the officer or others, or is fleeing and his escape will result in a
serious threat of injury to persons.’

6 *Rodriguez v. Swartz*, 899 F.3d at 729, quoting *Harris v. Roderick*, 126 F.3d 1189, 1201
7 (9th Cir. 1997).

8 **1. The Law Was Clearly Established.**

9 In *Tennessee v. Garner*, a fleeing suspect/Garner, stopped at a 6-feet-high chain link
10 fence at the edge of the yard. With the aid of a flashlight, Officer Hymon was able to see
11 Garner’s face and hand. 471 U.S. at 4. He saw no sign of a weapon, and, though not
12 certain, was “reasonably sure” and “figured” that Garner was unarmed. *Id.* While Garner
13 was crouched at the base of the fence, Officer Hymon called out, “police, halt” and took a
14 few steps toward him. Garner then began to climb over the fence. *Id.* Convinced that if
15 Garner made it over the fence he would elude capture, Officer Hymon shot him. Garner
16 was shot in the head and was later pronounced dead at the operating table. *Id.* Garner had
17 stolen a purse and 10 dollars from a house. *Id.* The Court held “the use of deadly force to
18 prevent the escape of all felony suspects, whatever the circumstances, is constitutionally
19 unreasonable. It is not better that all felony suspects die than that they escape. Where the
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1 suspect poses no immediate threat to the officer and no threat to others, the harm resulting
 2 from failing to apprehend him does not justify the use of deadly force to do so.” *Id.* at 11.

3 Recently, in *Glenn v. Washington County*, 673 F.3d 864 (9th Cir. 2011), the Court of
 4 Appeals was asked to determine whether officers' use of beanbag shotgun (and subsequently
 5 live ammo) on a victim after responding to the victim's mother's 911 for help with her
 6 distraught and intoxicated son was a reasonable use of force. The County argued that the
 7 officers did not use unreasonable force, and that they had qualified immunity, and the trial
 8 court dismissed plaintiffs' claims on appeal. The 9th Circuit reversed, finding questions of
 9 fact remained regarding the use of unreasonable force. But it also discussed the qualified
 10 immunity argument:

12 In evaluating a grant of qualified immunity, we ask two questions: (1)
 13 whether, taking the facts in the light most favorable to the nonmoving party,
 14 the officers' conduct violated a constitutional right, and (2) whether the right
 15 was clearly established at the time of the alleged misconduct. *See Saucier v.
 16 Katz*, 533 U.S. 194, 200–01, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), *overruled
 17 in part by Pearson v. Callahan*, 555 U.S. 223, 129 S.Ct. 808, 172 L.Ed.2d 565
 18 (2009). Either question may be addressed first, and if the answer to either is
 19 “no,” then the officers cannot be held liable for damages. *See Pearson*, 555
 20 U.S. at 236, 129 S.Ct. 808. In this case, the district court focused on whether
 21 the officers' use of force violated Lukus' Fourth Amendment rights, and held
 22 that it did not. Glenn argues on appeal that the district court erred in
 23 granting summary judgment on that basis. We agree that genuine issues of
 24 fact remain, and accordingly reverse. **We further conclude that resolution
 25 of these issues is critical to a proper determination of the officers'
 26 entitlement to qualified immunity.** We express no opinion as to the
 second part of the qualified immunity analysis and remand that issue to the
 district court for resolution after the material factual disputes have been
 determined by the jury.

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1 *Glenn v. Washington Cty.*, 673 F.3d 864, 870 (9th Cir. 2011) (Emphasis added).

2 Defendants argue that this court should find qualified immunity, relying on *Kisela v.*
 3 *Hughes*, 138 S. Ct., 1148 (2018). *Kisela*, however, is clearly distinguishable from this case in
 4 every aspect. The most significant difference is that in *Kisela*, the facts viewed in the light
 5 most favorable to Hughes failed to establish that the police officer had notice that a specific
 6 use of force was unlawful. 138 S. Ct., at 1151. It was undisputed that police responded to a
 7 report of a woman engaging in erratic behavior. When police arrived, they spotted a second
 8 woman standing behind a locked chain-link fence separating her from the officers. *Id.* The
 9 officers then saw another woman, Hughes, emerge from the house carrying a large knife at
 10 her side. Hughes matched the description of the woman who had been seen hacking a tree.
 11 *Id.* Hughes walked toward the second woman and stopped no more than sex feet from her.
 12 The officers drew their guns and at least twice told her to drop the knife. Though Hughes
 13 appeared calm, she did not acknowledge the officers' presence or drop the knife. *Id.* One of
 14 the officer dropped to the ground and shot Hughes four times through the fence. Hughes
 15 was later treated for non-life-threatening injuries. *Id.*

16 Without reaching the question of whether excessive force was used, the U.S.
 17 Supreme Court found that the officer had qualified immunity because she had not violated a
 18 clearly established, statutory or constitutional rights of which a reasonable person would
 19 have known. *Kisela*, at 1152. The Court found, "This is far from an obvious case in which

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1 any competent officer would have known that shooting Hughes to protect Chadwich
 2 (second woman) would violate the Fourth Amendment.” *Kisela*, at 1153.

3 Here, there are clear facts in dispute. Officer Donald alleges he shot Mr. Chaplin
 4 because he feared Mr. Chaplin would injure him with his skateboard, and he claims he shot
 5 Mr. Thompson because he was reaching for his firearm. Mr. Chaplin and Mr. Thompson
 6 deny these allegations. Mr. Chaplin did not walk towards Officer Donald with his
 7 skateboard to strike him after Officer Donald had already fired his weapon. Mr. Thompson
 8 was not on a suicide mission to grab Officer Donald’s gun away from him. He saw Officer
 9 Donald shoot his brother down. He knew Officer Donald would shoot and kill him.
 10 Viewing the evidence in the light most favorable to the nonmoving party, a jury can certainly
 11 conclude Officer Donald is not to be believed and that he used excessive force when he shot
 12 and paralyzed Mr. Chaplin and shot Mr. Thompson.

13 Viewing the facts in the light most favorable to Mr. Chaplin, it would have been clear
 14 to Officer Donald and to all reasonable officers that using deadly force and firing his
 15 weapon multiple times at Mr. Chaplin as he emerged from the woods because he failed to
 16 heed his commands to stop and drop to the ground violated the Fourth Amendment. Even
 17 under Officer Donald’s version of events, Mr. Chaplin was more than 20 feet away from
 18 him when he stood up from his crouching position. Officer Donald had numerous less
 19 lethal weapons at his disposal. He had his taser; he had a knife; he had his OC spray; he had
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1 had a flashlight he could have substituted for his baton. He was well trained and well versed
2 in self-defense maneuvers.

3 Likewise, viewing the facts in the light most favorable to Mr. Thompson, it would
4 have been clear to Officer Donald and to all reasonable officers that using deadly force and
5 firing his weapon multiple times at Mr. Thompson who was clearly unarmed and had no
6 access to a weapon violated the Fourth Amendment.
7

8 Plaintiffs' position, based upon the testimony of their expert, Gregory Gilbertson,
9 essentially is that Officer Donald's behavior was incompetent across the board in this matter:

10 The shooting and wounding of Bryson Chaplin and Andre Thompson by
11 Olympia Police Officer Ryan Donald on May 21, 2015 was an
12 unreasonable use of excessive force when a number of intermediate force
13 and control measures and less-lethal force and control measures were
14 immediately and readily available, and the use of deadly force employed
15 by Officer Ryan Donald was not in compliance with the Olympia Police
16 Department Use of Force Policy and Integrated Force Management Use
17 of Force Model dated May 12, 2010.

18 ***Decl. of Ko, Ex. "32", at p. 7 (Emphasis in original).***

19 That alone should negate qualified immunity. But is it also clear from the cases
20 cites that using deadly force against an unarmed, fleeing suspect, is unlawful, and to do so is
21 a knowing violation of the law.
22

23 d. **The City is Liable For Its Wrongful Acts**

24 Defendants argue that the City of Olympia bears no fault here under either the
25 theory of *respondeat superior* or due to ratification. Although admittedly Plaintiffs have alleged
26

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1 *respondeat superior* liability against the City for their § 1983 claims and their state law claims
 2 (discussed below), Defendants ignore the fact that Plaintiffs allege direct violation of § 1983
 3 by the City, and Plaintiffs' second cause of action specifically alleges Negligent Training,
 4 Supervision, Discipline, and Retention against the City of Olympia. (Dkt. No. 1). These are
 5 claims directly against the City arising out of its own acts or omissions, and Defendants have
 6 raised no arguments that this cause of action should be dismissed.

7 As to Plaintiffs' §1983 claims, a municipality or other local government may be liable
 8 under this section if the governmental body itself "subjects" a person to a deprivation of
 9 rights or "causes" a person "to be subjected" to such deprivation. *Monell v. New York City*
 10 *Dept. of Social Servs.*, 436 U.S. 658, (1978). While the City might not be vicariously liable for its
 11 employees' actions, under § 1983, local governments are responsible for "their *own* illegal
 12 acts." *Pembaur v. Cincinnati*, 475 U.S. 469, 479, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986)
 13 (citing *Monell*, 436 U.S., at 665–683, 98 S.Ct. 2018). *Connick v. Thompson*, 563 U.S. 51, 60, 131
 14 S. Ct. 1350, 1359, 179 L. Ed. 2.d 417 (2011). As noted in Footnote 3, Officer Donald's
 15 superiors were aware of his repeated failure to wait for back up and his tendency to go
 16 "hands on" in dealing with suspects. There is no evidence to date that, despite this
 17 knowledge, the City took any steps to prevent Officer Donald from acting in this manner
 18 during his encounters with Mr. Thompson and Mr. Chaplin. *Decl. of Ko, Ex. "17".*

19 Additionally, Plaintiffs' expert, Gregory Gilbertson, outlines the City's own negligent
 20 acts and omissions:

21 The shooting and wounding of Bryson Chaplin and Andre Thompson by
 22 Olympia Police Officer Ryan Donald on May 21, 2015 was the result of
 23 Olympia Police Department supervisory, command, and executive officers

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1 summarily failing to adequately and effectively train, supervise, discipline, and
2 retain Officer Ryan Donald after Sergeant Allen documented to Lieutenant
3 Raymond Holmes (Ret.) in a Memorandum dated May 13, 2013 of several
4 failures to meet department standards and ongoing concerns involving
5 Officer Donald's use of force in other incidents, which were personally
6 observed by Sergeant Allen and a number of un-named Olympia Police
7 officers, who set forth their observations and concerns regarding Officer
8 Donald to Sergeant Allen on about April 13, 2013.

9 *Decl. of Ko, Ex. "32", p. 7.*

10 e. **Plaintiffs' State Law Claims For Outrage, Negligence, and False Arrest**
11 **Outrage:**

12 Outrage: Defendants allege that the "shooting" here was "objectively reasonable"
13 and therefore there can be no outrage. As with Defendants' other statements, there is no
14 agreement that the multiple shootings by Officer Donald were in any way reasonable.
15 Plaintiffs' position is that shooting at unarmed shoplifters fleeing away is shockingly
16 unreasonable. The forensic evidence and the Declaration of Plaintiffs' expert Greg
17 Gilbertson, *Decl. of Ko, Ex. "32"*, support Plaintiffs' claims. Summary judgment dismissing
18 Plaintiffs' claim for outrage should be denied.

19 Negligence: There is clear and convincing evidence regarding negligence on the part
20 of the City of Olympia, as noted above. This evidence is set forth in detail in the declaration
21 of Plaintiffs' expert, Greg Gilbertson. See *Decl. of Ko, Ex "32", at pp. 7-8.*

22 False Arrest: Plaintiffs do not object to dismissal of their claims for false arrest.

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V. CONCLUSION

2 There is significant evidence that by shooting Mr. Chaplin multiple times when he
3 posed no immediate threat to Officer Donald and when Mr. Chaplin had only been involved
4 in a minor theft incident where no one was hurt or injured, Officer Donald used excessive
5 force, violating Mr. Chaplin's Fourth Amendment right to be free from unreasonable search
6 and seizure. There is also significant evidence that Officer Donald had other less lethal
7 weapons at his disposal, and by shooting Mr. Thompson when he posed no immediate
8 threat to Officer Donald and when he was not actively fleeing from Officer Donald, Officer
9 Donald used excessive force, violating Mr. Thompson's Fourth Amendment right to be free
10 from unreasonable search and seizure. As there are genuine issues of material fact in
11 dispute, Defendants' motion for summary judgment should be denied except as to Plaintiffs'
12 claims for false arrest.

DATED this 3rd day of December, 2018.

By: /S/ MONTE BERSANTE
MONTE BERSANTE,
WSBA# 17083

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